Supreme Court, U.S.
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No. 87-95

In The

Supreme Court of the United States

October Term, 1987

GARY R. HAGEBUSH,
ROY E. SCHWASINGER,
Petitioners,

v.

FIRST NATIONAL BANK OF OMAHA,
A Nebraska Banking Corporation,
Respondent.

GARY R. HAGEBUSH,
ROY E. SCHWASINGER,
Petitioners,

v.

NEBRASKA STATE BAR ASSOCIATION,
KAY ORR, GOVERNOR,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF IN OPPOSITION OF RESPONDENT NEBRASKA STATE BAR ASSOCIATION

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QUESTIONS PRESENTED

1. Whether Petitioners have stated a federal or constitutional question or whether their cause of action is based on state law theories of misrepresentation, fraud, and negligence.

2. Whether the Petitioners' questions presented have federal implications sufficient to invoke the jurisdiction of this Court.

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Respondent, Nebraska State Bar Association, respectfully requests this Court to deny the petition for a writ of certiorari to review the judgment of the Nebraska Supreme Court.

OPINION BELOW

The relevant opinion of the Nebraska Supreme Court appears in the appendix hereto.

STATEMENT OF JURISDICTION

The judgment of the Nebraska Supreme Court was entered on June 17, 1987 affirming the Lancaster County District Court's dismissal of Petitioners' motion for a writ of mandamus. The Petitioners did not properly raise, and the Nebraska Supreme Court did not enter judgment on, any federal question. The judgment of the Nebraska Supreme Court was based solely on Nebraska law and presents no constitutional or federal question. Therefore, the United States Supreme Court lacks jurisdiction to issue a writ of certiorari to the Nebraska Supreme Court.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The decision of the Nebraska Supreme Court was based upon the law of the State of Nebraska. Therefore, no United States Constitutional provisions or federal statutes were involved in the decision.

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STATEMENT OF THE CASE

The Petitioners alleged in Lancaster County District Court that the Respondent, Nebraska State Bar Association, through misrepresentation and mismanagement, allowed members of the Nebraska State Bar Association to violate the laws of the State of Nebraska and Articles I, III, and VI of the United States Constitution. The Petitioners sought a writ of mandamus to force the Nebraska

State Bar Association to produce documents relating to the alleged misconduct of attorneys licensed to practice law in the State of Nebraska. Alternatively, the Petitioner sought damages from the Nebraska State Bar Association in the amount of $596,987,000 for fraud, misrepresentation, mismanagement, interference with contractual rights, deceit and collusion.

The Lancaster County District Court sustained Respondent's demurrer and dismissed the Petitioners' action, refusing to issue the writ of mandamus, and the Petitioners appealed to the Nebraska Supreme Court. In the Nebraska Supreme Court, the Petitioners alleged the same claims against the Nebraska State Bar Association. The Petitioners also referred generally to Articles I, III, and VI of the United States Constitution. The Nebraska Supreme Court affirmed the dismissal of the Petitioners' action in the Lancaster County District Court without a published opinion. The Petitioners failed to assert any specific claim of violations of their federal or constitutional rights and no federal or constitutional questions were decided by the Nebraska Supreme Court.

SUMMARY OF THE ARGUMENT

The Petitioners are required to show that a constitutional or federal question was decided by the Nebraska Supreme Court. The Petitioners have failed to show the presence of a constitutional or federal question and the petition for a writ of certiorari should be denied.

The Petitioners have failed to sufficiently state the questions they are presenting to this Court. The Petitioners' questions presented are too indefinite to invoke this Court's jurisdiction.

The decision of the Nebraska Supreme Court was based upon the law of the State of Nebraska. The Nebraska Supreme Court did not refer in any way to a constitutional or federal question. In the absence of any showing by the Petitioners that the decision of the Nebraska Supreme Court could not be based upon the law of the State of Nebraska, this Court should not review that decision.

REASONS TO DENY THE PETITION

I. THE PETITIONERS HAVE FAILED TO PROPERLY PRESENT A FEDERAL QUESTION SUFFICIENT TO INVOKE THE JURISDICTION OF THIS COURT.

The judgment of the Nebraska Supreme Court did not involve a constitutional or federal question. If a federal question was presented to the Nebraska Supreme Court, the court did not pass judgment on that question. There was no reference to a federal right or question in the opinion of the Nebraska Supreme Court. "[W]hen, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York,* 394 U.S. 576, 582 (1969) (citation omitted).

The Nebraska Supreme Court did not decide a constitutional or federal question in affirming the dismissal

of the Petitioners' cause of action. The lack of reference to a constitutional or federal question leads to the assumption that such an issue was not properly raised. The Petitioners failed to properly raise a constitutional or federal question. The Petitioners cannot raise, in this Court or in the Nebraska Supreme Court, an issue that was not decided in the trial court.

The Petitioners in the present case did not raise a federal or constitutional issue involving the Nebraska State Bar Association in the Lancaster County District Court. The Petitioners' allegations in the district court were based on state law. In their brief to the Nebraska Supreme Court, the Petitioners alleged that the Nebraska State Bar Association interfered with their constitutional rights by interfering with their right to contract. The Petitioners referred generally to Articles I, III, and VI of the United States Constitution. The Petitioners, however, did not specifically indicate how their constitutional rights were infringed. It is well-stated rule of law in Nebraska that issues not raised in the lower court cannot be considered on appeal. "We will not consider [appellant's] contention for the first time here. Issues not properly raised in the pleadings nor litigated at trial will not generally be considered for the first time on appeal." *Armstrong v. Hartford Life Ins. Co., Inc.,* 219 Neb. 128, 131, 361 N.W.2d 511, 513 (1985).

The Supreme Court has no power to rule on an issue that was not properly raised in the highest state court. To determine the propriety of this Court's jurisdiction, the Court "must inquire whether that question was presented to the [state] courts in such a manner that it was neces-

sarily decided by the [state court]." *Street,* 394 U.S. at 581. The Supreme Court may review the final decision of the highest state court only if the aggrieved party is "denied some title, right, privilege, or immunity . . . [and] it appear[s] from the record that such title, right, privilege, or immunity was 'specially set up or claimed' in the state court as belonging to such party under the constitution, or some treaty, statute, commission or authority of the United States." *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 653 (1897). The Petitioners have failed to adequately claim they were denied a federal right and the record does not disclose such a denial. "This statutory requirement [that a constitutional or federal right was violated] is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference." *Oxley,* 166 U.S. at 655. The Petitioners have generally mentioned Articles I, III, and VI of the United States Constitution, but have not specifically alleged how their rights were violated. The claim of the Petitioners must be "so distinct and positive as to place it beyond question" that a federal right was asserted. *Oxley,* 166 U.S. at 655.

The fact that the Petitioners alleged a violation of their federal or constitutional rights is not sufficient. The federal question must be presented in the proper manner to the highest state court and it must appear that judgment was passed on the federal question. *Harding v. Illinois,* 196 U.S. 78, 86 (1904). A "vague objection" referring to the United States Constitution is not sufficient without any argument or authority in support of the objection. *Harding,* 196 U.S. at 88. "Errors assigned but not noticed or relied on in the brief or argument of coun-

sel, will be regarded as waived or abandoned." *Hulbert v. Chicago,* 202 U.S. 275, 277 (1906) (citations omitted). If Petitioners do not cite any authority or present any arguments to support their propositions, there must be evidence in the record to support claims that the state court decision involved a right claimed under the United States Constitution.

II. THE QUESTIONS PRESENTED BY THE PETITIONERS ARE TOO INDEFINITE AND GENERAL TO RAISE FEDERAL ISSUES BEFORE THIS COURT.

The questions presented by the Petitioners are very ambiguous. The Petitioners do not state how their federal rights were infringed by the Nebraska State Bar Association. The United States Supreme Court held in *Oliphant v. Brotherhood of Locomotive Firemen and Engineermen,* 359 U.S. 935 (1959) cert. denied, reh'g denied, 359 U.S. 962, that "[i]n view of the abstract context in which the questions sought to be raised are presented by this record, the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit is denied."

The Court limits considerations to "questions specifically brought forward by the petition." *General Taking Pictures Corp. v. Western Electric Co., Inc.,* 304 U.S. 175, 177 (1938). The Petitioners in the case at hand have failed to sufficiently bring forward a question for this Court to consider. The Petitioners' questions presented do not clearly and unambiguously state questions which may be considered by this Court.

III. THE DECISION BELOW WAS BASED ON STATE, NOT FEDERAL, LAW. THEREFORE, THIS COURT LACKS JURISDICTION TO GRANT THE WRIT OF CERTIORARI.

"Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." *Strembridge v. Georgia,* 343 U.S. 541, 547 (1952). The Petitioners' allegations against the Nebraska State Bar Association are based on state law and it does appear that the judgment of the state court was based on state law. Therefore, the United States Supreme Court should not grant a writ of certiorari to review the decision of the Nebraska Supreme Court.

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CONCLUSION

For each of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

BEFORE THE SUPREME COURT OF NEBRASKA

Water Conservation Systems Co.,	)	
	)	
Appellant,	)	
	)	No. 87-337
v.	)	ORDER.
	)	
Nebraska State Bar Association and Kay Orr, Governor,	)	(Filed June 19, 1987)
	)	
Appellees.	)	

This matter came on for consideration this 17th day of June 1987, upon the Court's own motion.

Our review reveals that there exists no error of law and that a detailed opinion would have no precedential value.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the district court's judgment of dismissal be, and the same hereby is, affirmed pursuant to the provisions of Neb. Ct. R. of Prac. 7A (rev. 1986).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the motions of the defendants, Nebraska State Bar Association and Kay Orr, Governor, for dismissal pursuant to Neb. Ct. R. of Prac. 7B(2) (rev. 1986), and the motion filed by plaintiff on June 12, 1987, seeking a determination of whether counsel appearing for said defendants could properly appear, each be, and each hereby is, overruled as moot.

BY THE COURT

/s/ Leslie Boslaugh
Chief Justice Pro Tempore